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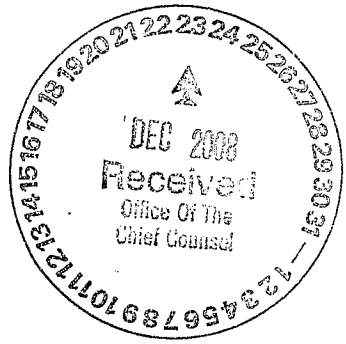

STATE WATER RESOURCES CONTROL BOARD

OF THE STATE OF CALIFORNIA

In the Matter of the Petition of ULTRAMAR, INC. For Review of Order No. R4-2008-0123 (NPDES Permit No. CA0057568) California Regional Water Quality Control Board, Los Angeles Region	No. VERIFIED PETITION FOR REVIEW AND REQUEST FOR HEARING

1. Ultramar, Inc. ("Petitioner") hereby files this Verified Petition for Review and Request for Hearing of Order No. R4-2008-0123, reissuing Waste Discharge Requirements/National Pollution Discharge Elimination System ("NPDES") Permit No. CA0057568 (the "Permit") for Petitioner's Wilmington Olympic Tank Farm ("OTF"). The Permit was adopted by the Los Angeles Regional Water Quality Control Board ("Regional Board") on November 20, 2008. A copy of the Permit is attached as Exhibit 1 to this Petition.

2. Petitioner's mailing address is as follows: Ultramar Inc., 2402 East Anaheim, Wilmington, California 90744-4081, attention: Mr. Wesley Waida, Environmental Manager. Petitioner's telephone number is (562) 491-6890.

3. Petitioner operates the OTF, located at 1220 North Alameda Street in Wilmington, California. Petitioner leases the OTF site from the Los Angeles Department of Water and Power. The OTF discharges storm water and fire protection system test water to the Dominguez Channel Estuary from a single outfall.

4. This Petition is filed pursuant to section 13320 of the Water Code, which authorizes any aggrieved person to petition the State Water Resources Control Board ("State Board") to review an action by a regional water quality control board.

5. The Permit includes new requirements for Petitioner to comply with numeric water quality-based effluent limitations ("WQBELs"), and receiving water limits for bacterial parameters, for storm water and fire protection system test water discharges at the OTF, which limitations were not present in the facility's previous permit. The Regional Board's action in adopting the Permit containing numeric storm water WQBELs was improper because such limits, as applied at the OTF, are inconsistent with state and federal law and policy, including the Clean Water Act ("CWA"), the California Toxics Rule ("CTR"), the State Board's Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays and Estuaries of California ("State Implementation Policy" or "SIP"), and other federal and state policy and guidance regarding storm water discharges. In addition, the Regional Board's action is contrary to the final Judgment in *Cities of Arcadia, et al. v. State Water Resources Control Board, et al.* (Orange County Superior Court, Case No. 06CC02974, November 19, 2008) which invalidated the Regional Board's water quality standards as applied to storm water. Further, the Regional Board's action was improper in that it inappropriately applied the CTR and the SIP to storm water discharges and failed to justify numeric storm water limits based on any "unique" or specific circumstances at the OTF. The Regional Board's finding of "reasonable potential" and reliance on the SIP methodology to impose WQBELs on fire protection system test

water was similarly flawed, failing to appropriately take into account the intermittent nature and short duration of such discharges. In addition, the Regional Board erred in imposing receiving water limits and monitoring requirements for total coliform, fecal coliform and enterococcus, and receiving water monitoring requirements for ammonia, based on assumptions that were erroneous and unsupported by evidence in the record.

6. Petitioner is aggrieved by the Regional Board's action because it will be subject to the improper provisions in the Permit and will be at significant risk of noncompliance and exposed to substantial liability for fines and penalties.

7. Petitioner requests that the State Board amend or revise the Permit to delete the new numeric WQBELs for storm water and fire protection system test water; direct the Regional Board to require implementation of Best Management Practices ("BMPs") for such discharges consistent with federal and state law and policy; and delete the receiving water limits and monitoring requirements for total coliform, fecal coliform, and enterococcus and receiving water monitoring requirements for ammonia.

8. Petitioner's statement of points and authorities in support of the issues raised by this Petition commences below.

9. A copy of this Petition is being sent via first-class mail to the Regional Board on December 22, 2008, to the attention of Ms. Tracy Egoscue, Executive Officer.

10. Petitioner submitted comments on the tentative Permit to the Regional Board on April 18 and November 11, 2008, raising the substantive issues and objections raised in this Petition. The Regional Board issued revised versions of the tentative Permit on June 9 and September 9, 2008 and adopted the final Permit on November 20, 2008, but did not modify the improper provisions to which this Petition objects.

11. Petitioner requests a hearing to address the contentions herein and reserves the right to present additional evidence. *See* 23 Cal. Code Regs., § 2050.6.

STATEMENT OF POINTS AND AUTHORITIES

I. BACKGROUND

The OTF serves as a bulk storage facility for Petitioner's Wilmington Refinery, located two miles to the southwest of the Refinery and connected to it by pipelines. The OTF is designed to receive and ship intermediates, feedstocks, and refined products by pipeline, marine vessels and trucks. The OTF is not currently in use and Petitioner has not conducted any receiving, transferring, or storage of oil there since 2001. However, Petitioner intends to utilize the OTF in the future.

Residual fuel oil currently is stored in one storage tank within the tank farm area, which is surrounded by a 15-foot earthen dike. Pursuant to the U.S. Environmental Protection Agency ("EPA") Spill Prevention, Control and Countermeasure ("SPCC") regulations and guidance, Petitioner is required to maintain the spill containment capacity, which precludes the accumulation and storage of large volumes of water within the containment area.[1] The OTF also contains a fire prevention sprinkler system for the storage tank farm area. The source water for the fire prevention system is the municipal drinking water supply; no chemicals are added to the fire prevention system.

The tank farm containment area is connected by a closed pipe to a four-stage skim pond. During rain events, a valve is opened and storm water that has accumulated in the containment area is directed by gravity flow to the skim pond. In addition, when the fire prevention system is tested periodically, water that sprays out of the sprinklers (much like rainfall) collects within the bermed area and is released to the skim pond at the conclusion of the test. The skim pond is designed to remove sediment, petroleum compounds and grease from the storm water and fire prevention system runoff, but does not have excess capacity to store water.

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[1] 40 C.F.R. section 112.7(c)(2) requires secondary containment to accommodate the capacity of the largest single container plus "sufficient freeboard to contain precipitation." EPA's SPCC Guidance for Regional Inspectors (2005), p. 4-13, indicates that 110% of storage tank capacity is generally required.

Water that is discharged from the skim pond flows through another closed pipe and ultimately discharges, through Discharge Point 001, to an open drainage ditch located along the Southern Pacific Railroad tracks. This ditch is part of the municipal storm sewer system, and it receives storm water runoff from other industrial facilities located both upstream and downstream of the OTF, as well as runoff from streets in the vicinity of the OTF. The open drainage ditch discharges to the Dominguez Channel Estuary approximately 1000 feet downstream from the OTF.

On September 10, 2007, Petitioner applied for renewal of its previous NPDES permit for the OTF, Order No. R4-2003-0052 (the "Prior Permit"). On March 18, 2008, the Regional Board issued a tentative order, which proposed to find reasonable potential ("RP") and add new numeric effluent limits for arsenic, copper, lead, mercury, nickel, zinc, ammonia and temperature, and receiving water limits for total coliform, fecal coliform, and enterococcus. These limits were not present in the Prior Permit. The tentative order also proposed receiving water monitoring requirements for total ammonia, coliform and fecal coliform, and enterococcus.

On April 18, 2008, during the comment period on the tentative order, Petitioner submitted timely comments objecting (among other things) to the proposed limits for storm water and fire prevention system test water and receiving water monitoring requirements, on the same grounds as set forth in this Petition. On June 9, 2008, the Regional Board responded to Petitioner's comments and issued a revised tentative Permit. The Regional Board issued a second revised tentative Permit on September 10, 2008, to which Petitioner submitted supplemental comments on November 11. Finally, the Regional Board adopted the Permit, Order No. R4-2008-0123, on November 20, 2008. The final Permit included the proposed limits for storm water and fire prevention system test water and the receiving water monitoring requirements without modification.

In its June 9, 2008 response to Petitioner's comments, the Regional Board acknowledged that under federal and state law and policy, BMPs are the preferred approach for controlling storm water discharges. *Ultramar, Inc., Wilmington Olympic Tank Farm*

(NPDES No. CA0057568) Response to Comments ("Response to Comments"), pp. 2-3. Nevertheless, the Regional Board asserted that "permitting authorities may identify circumstances warranting numeric effluent limitations" for storm water and that such limits were justified for the OTF because (i) RP was demonstrated for each of the pollutants using procedures from the SIP; and (ii) the receiving water body is listed as "impaired" under CWA section 303(d). *Id.* at 2-5.

The Regional Board's assertions seeking to justify numeric storm water limits are in error. First, while it is true that WQBELs are required once RP has been demonstrated (if the demonstration is performed correctly, which Petitioner disputes as discussed below), it does not follow that those limits must be *numeric; see Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal. App. 4th 1089, 1104-1105 ("*CBE*"). Thus, the Regional Board's repeated claim that numeric limits are required simply because RP exists (Response to Comments, pp. 2-3, 5-6, 8, 9) is incorrect. Second, the claim that the mere fact of 303(d) listing requires numeric limits (*id.*, at 2, 13) is equally misplaced, as EPA guidance (discussed below) explains that BMPs are appropriate for storm water discharges to 303(d)-listed receiving waters.

The circumstances relied on by the Regional Board do not justify departing from the well-established BMP-based approach. In particular, the Regional Board has failed to either demonstrate that calculation of scientifically valid numeric storm water limits is feasible in this case, or to identify any "unique" reasons to impose such limits on the OTF that would not apply equally to storm water discharges from any other industrial facilities. *See In the Matter of the Petition of Boeing Company*, Order No. 2006-0012, 2006 WL 4030793, December 18, 2006 ("*Boeing Order*"), discussed below. Accordingly, the Regional Board's decision to impose numeric storm water limits on the OTF was arbitrary and capricious, unsupported by and inconsistent with law and policy. The Regional Board's justifications for the fire protection system test water WQBELs and for receiving water limits and monitoring requirements are also flawed, for reasons discussed below.

II. UNDER FEDERAL AND STATE LAW AND POLICY, BMPS ARE THE APPROPRIATE TYPE OF WATER QUALITY-BASED EFFLUENT LIMITATION FOR STORM WATER DISCHARGES

A. FEDERAL LAW AND POLICY SUPPORT THE USE OF BMPS RATHER THAN NUMERIC LIMITS FOR STORM WATER

Under the CWA, NPDES permits must include both technology-based and water quality-based effluent limitations. Under 40 C.F.R. § 122.44(d)(1), WQBELs are required when pollutants are discharged at levels which have a reasonable potential to cause or contribute to exceedance of state water quality standards. In determining whether RP exists, the permit writer must use procedures which account for existing controls on point and non-point sources of pollution, the variability of the pollutant in the effluent, the sensitivity of species used in whole effluent toxicity testing and, where appropriate, the dilution of the effluent in the receiving water. 40 C.F.R. § 122.44(d)(1).

The CWA defines effluent limitations (including WQBELs) as "any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11). As the court in the *CBE* case held, under this broad definition, WQBELs need not be numeric. *CBE*, 109 Cal. App. 4th at 1104-1105. In particular, federal regulations expressly authorize a BMP-based approach in establishing WQBELs for storm water. 40 C.F.R. § 122.44(k) provides that BMPs may be used "to control or abate the discharge of pollutants when: . . . (2) authorized under section 404(p) of the [CWA] ***for the control of storm water discharges***; (3) ***numeric*** effluent limitations are ***infeasible***; or (4) the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the [CWA]" (emphases added). "[E]ssentially, 40 C.F.R. § 122.44(k)(2) allows permitting agencies to treat BMPs as the type of WQBEL appropriate for control of storm water discharges." *Divers' Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal. App. 4th 246, 257 ("*Divers*"). The *Divers* court found that "[BMPs] authorized by 40 C.F.R.

122.44(d)(1)(ii) are in fact WQBELs which a permitting authority may employ when it has found that storm water discharges may cause a receiving body to exceed state water quality standards." *Id.* at 258. Though not in the specific context of storm water, federal Courts of Appeal have also concluded generally that the CWA does not mandate numeric effluent limitations where infeasible, *Citizens Coal Council v. U.S. EPA*, 447 F.3d 879, 895-896 (6th Cir. 2006); and that non-numeric BMPs constitute effluent limitations under the CWA, *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 496-97, 502 (2nd Cir. 2005). Thus, under *CBE*, *Divers*, and the Second and Sixth Circuit decisions, not to mention the express language of 40 C.F.R. § 122.44(k), the Regional Board is simply wrong to assert that "[f]or all parameters that have a reasonable potential, numeric WQBELs are required" (Response to Comments, p. 12).

As discussed in Petitioner's April 18, 2008 comments (pp. 3-4) and November 11, 2008 supplemental comments (pp. 2-4), EPA regulations and policy endorse the use of BMPs, rather than numeric WQBELs, to regulate storm water discharges such as those at the OTF. According to EPA's *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 43761 (Aug. 26, 1996):

> Due to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations . . . EPA will use an interim permitting approach for NPDES storm water permits. The interim permitting approach uses [BMPs] in first-round storm water permits and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.

EPA did note that "[i]n some cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits as necessary and appropriate." *Id.* However, in the absence of such information, BMPs are the only justifiable approach.[2]

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[2] The Regional Board relies on the EPA's statement supporting more specific conditions or limitations on storm water "where adequate information exists." See, e.g., Response to (continued...)

In discussing why scientifically valid numeric WQBELs are difficult to derive for storm water discharges, EPA explained that such discharges "are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex." EPA, *Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 57245, 57246 (Nov. 6, 1996). EPA further explained that:

> [T]he existing methodologies for deriving numeric water quality-based effluent limitations [] were designed primarily for process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in receiving waters. Using these methodologies, limitations are typically derived for each specific outfall to be protective of low flows in the receiving water. Because of this, permit writers have not made widespread use of the existing methodologies and models for storm water discharge permits.

Id. EPA's conclusions in 1996 remain true today. Indeed, as recently as September 2008, in the Fact Sheet for its reissued Storm Water Multi-Sector General Permit for Industrial Facilities ("Multi-Sector General Permit"), EPA stated: "At this time, it is generally not feasible for EPA to calculate numeric effluent limitations" due to the "highly intermittent" and variable nature of storm water. Final NPDES General Permit for Stormwater Discharges from Industrial Activities, 73 Fed. Reg. 56572 (September 29, 2008); Fact Sheet at pp. 38-39.

Disregarding EPA's contemporaneous endorsement of BMPs, the Regional Board (Response to Comments, pp. 3-4) asserts that the continued validity of EPA's 1996 interim policy is questionable following the Ninth Circuit's decision in *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), and that the numeric storm water limits in the OTF Permit are necessary to "give effect to the reasoning" in that case. On the contrary, the Ninth Circuit *upheld* EPA's reliance on its policy of using BMPs "to provide for the attainment of water quality standards." *Id.* at 1166. The dictum in *Defenders of Wildlife*

(...continued)
Comments, p. 7. However, as discussed below, the Regional Board's assertion is unsupported by any "adequate information" that could support such limits for the OTF.

that "industrial discharges [unlike municipal discharges] must comply strictly with state water-quality standards" (*id.* at 1165) cannot reasonably be interpreted to mean that numeric limitations must be imposed, without regard to the technical infeasibility of calculating appropriate limits for highly variable storm water discharges. Instead, the court characterized industrial dischargers' compliance obligation as "strict" to distinguish it from the less strict "maximum extent practicable" standard applicable to municipal storm water dischargers. The court did not address at all the question of feasibility of calculating numeric limits for storm water discharges associated with industrial activity, and nothing in *Defenders of Wildlife* casts any doubt on the continuing validity of BMPs as authorized by EPA's interim storm water permitting policy or 40 C.F.R. § 122.44(k). See 191 F.3d at 1166-1167.

Indeed, if the Regional Board's reading of that case were correct, both EPA's and the State Board's general permits for storm water discharges from industrial facilities, which continue to rely on BMPs, would be illegal. Obviously that is not the case. For example, undeterred by *Defenders of Wildlife*, in the following year EPA adopted the Multi-Sector General Permit (65 Fed. Reg. 64746, October 30, 2000), citing *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1380 and n. 21 (D.D.C. 1977) in support of BMPs: "Congress did not regard numeric effluent limitations as the only permissible limitation on a discharger. . . . [W]hen numerical effluent limitations are infeasible, EPA may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels." See 65 Fed. Reg. at 64759. Within the last few months, EPA stated the same view yet again when reissuing its updated Multi-Sector General Permit, see Fact Sheet for Multi-Sector General Permit, p. 35, n. 4 (September 29, 2008); and when proposing effluent limitation guidelines for the Construction and Development Point Source Category; see 73 Fed. Reg. 72562, 72568 (November 28, 2008) (in both instances quoting *NRDC v. Costle* for the proposition that EPA is authorized to promulgate non-numeric effluent limitations). As those recent actions demonstrate, EPA has found no

reason to revisit its position, based either on *Defenders of Wildlife* or any other subsequent developments.

Most significantly, EPA affirmed the appropriateness of the BMP-based approach in guidance on establishing waste load allocations for storm water as part of the Total Maximum Daily Load process. *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* ("*Establishing TMDLs*"), EPA Office of Water, November 22, 2002. In that guidance, EPA stated that WQBELs for storm water discharges that implement TMDLs may be expressed in the form of BMPs. *Id.* at 2. EPA further stated that it "recognizes that the available data and information usually are not detailed enough to determine wasteload allocations for NPDES-regulated storm water discharges on an outfall-specific basis." *Id.* at 4. Thus, EPA concluded, BMPs are an appropriate means of regulating storm water discharges, even in situations where the receiving waters are listed as impaired under CWA section 303(d).

B. STATE LAW AND POLICY, INCLUDING THE *BOEING* DECISION, SUPPORT THE USE OF BMPS RATHER THAN NUMERIC LIMITS FOR STORM WATER

For the same reasons as those relied on by EPA, when the State Board issued its own general permit for industrial storm water discharges, the Board determined that:

> it is not feasible at this time to establish numeric effluent limitations. This is due to the large number of discharges and the complex nature of storm water discharges. This is also consistent with the US EPA's August 1, 1996 "Interim Permitting Approach for Water Quality Based Effluent Limitations in Storm Water Permits" . . . .
>
> Best Management Practices (BMPs) to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges are appropriate where numeric effluent limitations are infeasible, and the implementation of BMPs is adequate to achieve compliance with BAT/BCT and with water quality standards.

State Board Order No. 97-03-DWQ, *NPDES General Permit/Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities*

Excluding Construction Activities (April 17, 1997), at pp. 2-3; *see also* Fact Sheet for State Board Order No. 97-03-DWQ at p. VIII.

More recently, the State Board commissioned an expert panel to address the feasibility of setting numeric pollutant limits for storm water discharges. The panel's final report, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* (June 19, 2006) ("Panel Report"), observed that "there is wide variation in storm water quality from place to place, facility to facility, and storm to storm . . . . Since the storm-to-storm variation at any outfall can be high, it may be unreasonable to expect all events to be below a numeric value." Panel Report, p. 6. The Panel Report recommended that, before numeric storm water limits are established for an industrial category, a database of pollutants discharged and achievable pollutant limits for that category should be established. *Id.*, p. 21. Though the Regional Board claims that this conclusion in the Panel Report represents an endorsement of numeric storm water limits (Response to Comments, p. 7), it fails to note that the panel found that no such database now exists, for any industrial category, so numeric limits are at best premature. *Id.*

Finally, the State Board's *Boeing Order* considered the issue of numeric limits for storm water discharges. In that decision, the State Board upheld the numeric limits for the facility at issue – but did *not* repudiate its general policy regarding the appropriateness of BMPs. Rather, the State Board took care to emphasize that numeric limits were justified in that case due to the unique circumstances presented by Boeing's Santa Susana Field Laboratory ("SSFL"). The State Board concluded that the SSFL was "unique" based on its

site characteristics and history of water quality problems. *Boeing Order* at 6.[3] Indeed, throughout the order, the State Board's insistence on the "uniqueness" of the facility is striking; see *id.* at 2 ("[t]he issues addressed in this Order are relevant only to a unique industrial operation subject to an individual NPDES permit"); *id.* at 6 ("[t]he conditions described above make SSFL a unique site, especially because of its size, the degree of historical contamination, and the site topography that results in large amounts of runoff during storm events"); *id.* at 8 ("SSFL is a unique site warranting thorough and detailed regulation. It is not at all the same as a typical facility subject to the General Permit for Industrial Activities"); *id.* at 13 ("we again consider the uniqueness of the SSFL site – its large size, its hilltop location, the significant chemicals used in the past, and to a lesser extent, in the present"); *id.* at 18 ("the Boeing site is unique [] from a physical standpoint – the immense area covered, the extensive past contamination, existing activities, and the amount of runoff from the steep terrain").[4]

By contrast, there is nothing unique about the OTF or its storm water discharges, which are typical for industrial facilities where surface runoff may be exposed to contaminants. The Regional Board offered no discussion in the Permit, the Fact Sheet or the Response to Comments regarding the "uniqueness" of the OTF. On the contrary, the Regional Board referred only to the fact that the Dominguez Channel is 303(d)-listed and that water quality standard exceedances have occurred -- facts which are certainly not

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[3] Specifically, the State Board identified the SSFL as unique because it (1) is a large industrial site in a remote area; (2) occupies a large area on hillsides with runoff flowing into a number of different watersheds; (3) features large areas of historical contamination and development near large areas of open space and native vegetation; (4) could discharge an estimated 272 million gallons of storm water runoff in a 24-hour, 10 years storm event; (5) is the subject of ongoing cleanup and groundwater remediation pursuant to the Resource Conservation and Recovery Act; and (6) could affect residential developments in the vicinity. *Boeing Order* at 6. None of these "unique" facts is pertinent to the OTF.

[4] The State Board also found that the SSFL was unique "from a regulatory perspective [because] it has been subject to numeric effluent limitations for storm water discharges for many years." *Boeing Order* at 18. By contrast, the numeric limits for arsenic, copper, lead, mercury, nickel, zinc, ammonia, several bacteria parameters and temperature for the OTF's storm water discharges were not present in the Prior Permit and are new in this Permit.

unusual, much less "unique." Accordingly, the Regional Board's decision to impose numeric storm water limits on the OTF finds no support in the *Boeing Order*. In sum, the fundamental facts on which both EPA and the State Board relied in their general permits and policies, as discussed above, apply equally to storm water discharges at the OTF.

III. THE REGIONAL BOARD IMPROPERLY RELIED ON THE SIP AND CTR TO DETERMINE REASONABLE POTENTIAL AND CALCULATE WQBELS FOR STORM WATER DISCHARGES

In finding reasonable potential to cause or contribute to exceedances of water quality standards and in calculating WQBELs for arsenic, copper, lead, mercury, nickel and zinc, the Regional Board improperly chose to apply procedures from the SIP. *See* Permit Fact Sheet, pp. F-14-27. The SIP expressly "does not apply to regulation of storm water discharges." SIP, p. 3, n.1.[5] Nevertheless, the Regional Board asserted that it had sufficient data available to utilize the SIP methodology to determine RP and to establish numeric limits for storm water based on CTR criteria. Response to Comments, pp. 4-6, 12, 14. However, as discussed below, neither the SIP nor the CTR was intended for that purpose and it is both technically and legally incorrect to use the SIP procedures and CTR criteria for determining RP and setting numeric limits for storm water discharges. The Regional Board has failed to demonstrate that available data are sufficient to determine RP and numeric WQBELs in a scientifically valid manner.

A. THE REGIONAL BOARD'S RELIANCE ON SIP PROCEDURES WAS TECHNICALLY INCORRECT

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[5] Footnote 1 excluding storm water from the scope of the SIP has been present in the SIP from its original promulgation in May 2000. More recently, the State Board amended the SIP to remove any possibility of confusion on this point. The 2000 SIP, at p. 1, included "issuance or waiver of waste discharge requirements (WDRs)" as well as NPDES permits in the list of actions subject to the SIP. However, WDRs, under state law, may be required for discharges not subject to NPDES permits. In the 2005 amendments to the SIP, the State Board deleted the reference to WDRs, stating: "This change further clarifies that the SIP applies only to NPDES discharges to inland surface waters, enclosed bays, and estuaries, and does not apply to nonpoint sources, *storm water*, or ocean discharges." Final Functional Equivalent Document, Amendments to the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (February 24, 2005), p. 31 (emphasis added).

The SIP procedures apply to steady-state discharges and are based on a statistical model (the lognormal model) that does not fit storm water data. *See* SIP sections 1.3, 1.4. Further, the SIP calculation procedures are intended to control the frequency of exceedance, and thus, do not provide an appropriate basis for establishing numeric limits expressed as never-to-be-exceeded numbers. Storm water discharges are very different from traditional process wastewater discharges, which tend to be relatively stable in their composition, volume and flow. The availability of specific data for flow rate, volume, and time from point sources allow for an accurate calculation of pollutant mass and concentration for such wastewater. By contrast, storm water discharges vary widely in their timing, duration, quantity, flow and constituent concentrations, determined by rainfall which is intermittent and highly variable. Rainfall varies over the course of the season and also over the course of individual storms. In arid portions of the state, such as the Los Angeles area, there may be only a few storms per year that generate runoff, and the volume of runoff in separate storms may vary greatly. Given the lack of information to accurately characterize the intermittent and variable nature of storm water, it is inappropriate to use data from discrete sampling events to conclude that there is RP for exceedances of water quality standards or to calculate numeric WQBELs. Sampling of discrete storm water discharges merely provides a "snapshot" of pollutant concentrations at a particular time and place — it is not representative of the entire flow of storm water discharged from a given site. Thus, any RP determination based on methodology designed for process wastewater discharges (such as the SIP) is scientifically invalid.

The Regional Board also purports to rely on EPA's March 1991 *Technical Support Document for Water Quality-based Toxics Control* ("TSD"), stating that the TSD RP procedure is applicable to storm water discharges. Permit Fact Sheet, p. 15; Response to Comments, p. 10-11. These statements are incorrect, as the TSD contains no RP method for storm water discharges. The Permit Fact Sheet (p. 15) cites a statement in the TSD that "an analogous approach developed by a regulatory authority can be used to determine the reasonable potential" for storm water discharges. However, the Regional Board did not

develop any such "analogous approach" for intermittent and variable storm water flows. Instead, the Regional Board applied the existing procedure as if the storm water flows were a continuous process wastewater discharge. Moreover, the Regional Board failed to account for factors considered in the TSD's dry weather RP procedure, including the frequency of discharge, the duration of discharge, dilution in receiving water and receiving water flow rate. Indeed, failure to consider a mixing zone in the RP analysis and in the calculation of the numeric limits, despite the physical fact of dilution of the discharges with receiving water, undermines the scientific validity of both RP and WQBEL determinations.[6]

Finally, the Regional Board exhibits a basic confusion between the alleged need for storm water limits and the basis for calculating them. The Regional Board concedes that BMPs are the preferred approach and that storm water discharges are complex, but asserts that "the simple fact remains Ultramar's discharges exceed water quality standards and are discharged into the Dominguez Channel at a time when the Dominguez Channel and ultimately the Los Angeles Harbor is exceeding water quality standards and cannot assimilate additional impairing pollutants." Response to Comments, p. 5. However, that "simple fact" addresses the alleged *need* for stringent storm water controls. As discussed above, the EPA's and the State Board's endorsement of BMPs and concerns with the use of the CTR and SIP procedures for storm water are based on the infeasibility of *calculating* numeric limits for occasional and highly variable storm water flows. Indeed, EPA's storm water policy provides that more specific conditions, such as numeric limits, may be included *only* when adequate information exists to develop those conditions or limits. 61 Fed. Reg. 43761. However, the Regional Board did not address those concerns or demonstrate the adequacy of available information in this case. To claim that numeric

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[6] Although Petitioner's April 18, 2008 comment letter, at pp. 6, 12 and 17, repeatedly objected to the Regional Board's categorical denial of mixing zones and failure to account for the dilution of the discharges in receiving water, the Regional Board's Response to Comments did not address those comments.

limits would have value, if valid limits could feasibly be developed, does not mean that they *can* feasibly be developed, using the SIP or any other procedures, based on data currently available.

In addition, in asserting that 303(d)-listing justifies numeric limits for these pollutants in storm water (*see* Response to Comments, pp. 3, 13), the Regional Board is apparently relying on the listing of the Dominguez Channel as impaired by ammonia, benthic community effects, benzo(a)pyrene, benzo(a)anthracene, chrysene, coliform bacteria, chlordane (tissue), DDT (tissue and sediment), dieldrin (tissue), lead (tissue), PCBs, phenanthrene, pyrene, and zinc (sediment). *See* Permit Fact Sheet, p. F-11. However, in addition to ammonia, lead and zinc WQBELs, the Permit contains WQBELs for arsenic, copper, mercury and nickel. The Regional Board provides no explanation of the purported relationship between these pollutants and the impairment of receiving waters. More important, as noted above, the fact that receiving waters are 303(d)-listed does not in any way undermine the appropriateness of reliance on BMPs where numeric limits are infeasible; *see* EPA's guidance on *Establishing TMDLs,* pp. 2-4.

Furthermore, even if the SIP did apply (which it does not), in this case the limited available data were insufficient to perform a proper RP analysis for certain constituents which received WQBELs. In the February 12, 2003 to February 19, 2005 monitoring data utilized for the RP analysis (see Fact Sheet, Table F-2, pp. F-5 – F-6), only a single detection was recorded above the respective detection limits for each of ammonia and mercury: ammonia at 0.99 mg/l on December 6, 2004 and mercury at 0.00134 mg/l on February 12, 2003. *See* effluent monitoring data (attached as Exhibit 2). The SIP, Section 1.3, provides that when data are insufficient, the Regional Board "shall require additional monitoring for the pollutant in place of a water quality-based effluent limitation." Effluent monitoring for ammonia and mercury is, at most, the approach the Regional Board should have taken based on a single detection for each of those constituents.

In sum, applying the SIP and TSD methodology was scientifically inappropriate for the infrequent, intermittent discharge of storm water runoff to receiving waters with an

extremely high tidal exchange rate. In response to this objection, the Regional Board has explained only why it considers numeric WQBELs for storm water to be desirable, but has failed to explain how this renders them feasible – an essential condition for imposing numeric storm water limits.

B. THE REGIONAL BOARD HAS NO DISCRETION TO APPLY SIP PROCEDURES AND CTR CRITERIA TO STORM WATER DISCHARGES

The simple statement that the SIP does not apply to storm water, in SIP footnote 1, is amplified by the State Board's discussion in the Functional Equivalent Document ("FED") that accompanied adoption of the SIP, in satisfaction of the State Board's legal obligations under the California Environmental Quality Act ("CEQA"). In the FED, Chapter 5.1, the State Board determined that applying the SIP procedures to storm water would be infeasible:

> Storm water discharges are highly variable both in terms of flow, pollutant load and concentrations. In addition, the relationships between storm water discharges and water quality can be complex . . . . Because of the nature of storm water discharges and the typical lack of information on which to base numeric water quality based effluent limitations, it has not been feasible for the State Board to establish numeric effluent limitations for storm water permits.

FED, at V-136. Accordingly, the State Board adopted the No Action alternative for storm water regulation:

> This alternative makes no changes in the existing storm water program at the SWRCB and RWQCBs . . . . The existing NPDES storm water permits contain narrative objectives, rather than the numeric limits found in the more conventional NPDES permits. Compliance with these narrative objectives is a function of the dischargers' timely and effective implementation of the management practices and programs identified in the storm water management plan (MS4 permits) or the storm water pollution prevention plan (industrial/construction permits).

FED, at V-137. By choosing the No Action alternative, the State Board did not create discretion for the Regional Board to apply the SIP procedures to storm water, but rather

precluded the exercise of such discretion. Indeed, had the State Board chosen to establish discretion to apply the SIP procedures to storm water on a case-by-case basis, the FED would have been required to evaluate reasonably foreseeable means of compliance associated with that option; *see* State CEQA Guidelines (14 Cal. Code Regs.) § 15187. FED Chapter 5.1 contains no such evaluation, because there is no discretion for the SIP procedures ever to apply to storm water.[7]

In addition, in its own review of the SIP, the Office of Administrative Law ("OAL") *deleted* a provision in SIP section 3 that would have provided the regional boards with discretion, on a case-by-case basis, to require monitoring of certain toxics in storm water:

> The inclusion of storm water dischargers in this part of the policy is confusing in light of the State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that: ***This policy does not apply to regulation of storm water discharges***. Footnote 1. Consequently, the provision regarding storm water dischargers in Section 3 of the policy is severed and disapproved.

OAL, Notice of Approval of Regulatory Action at 5, May 22, 2000 (emphasis added). In light of OAL's conclusion, in particular, it is insupportable to re-interpret Footnote 1 as authorizing a case-by-case application of the SIP to storm water discharges, as the Regional Board proposes. On the contrary, to do so would read Footnote 1 out of the SIP, and would constitute underground rulemaking, in violation of the California Administrative Procedure Act and contrary to the CEQA findings on which the State Board relied in adopting the SIP.

Moreover, the SIP procedures are intended to implement the CTR. Yet in adopting the CTR, EPA indicated that "compliance with water quality standards through the use of [BMPs] is appropriate." 65 Fed. Reg. 31682, 31703 (May 18, 2000). In response to

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[7] As noted above, in 2005 the State Board amended the SIP to further clarify the exclusion of storm water from its scope. In addition, in response to comments regarding amendments to the SIP in 2005, the State Board reiterated its view that the SIP "clearly states that it does not apply to regulation of storm water discharges." Public Comments and Staff Responses to Proposed 2005 Amendments to SIP Functional Equivalent Document, Response to Comment 15 (February 3, 2005).

comments on the proposed CTR, EPA clearly stated that its criteria were not intended to be applied as a basis for numeric storm water limits:

> which would be equivalent to criteria values and applied as effluent limits never to be exceeded, or calculated in the same manner that effluent limits are calculated for other point sources, such as POTWs . . . . Wet weather discharges also occur under more diverse hydrologic or climatic conditions than continuous discharges from industrial or municipal facilities, which are evaluated under critical low flow or drought conditions. If the EPA had enough data to completely characterize all the conditions and do the necessary modeling, WQBELs would be developed ***using dynamic models to account for the intermittent loadings and exposures from the storm water discharges.*** In the absence of this data, EPA will continue to advocate the use of BMPs, as discussed in the CTR preamble.

California Toxics Rule Response to Comments Report, Volume II (December 1999), Response to Comment CTR-001-007 (emphasis added). Thus, the Regional Board's suggestions that "the CTR does not exclude storm water discharges" and supersedes pre-CTR permits and policies favoring BMPs (Response to Comments, pp. 4-6) are, at best, misleading and inconsistent with EPA's own view that "the final CTR will not significantly affect the current storm water program being implemented by the State, which includes the requirement to develop [BMPs] to control pollutants in storm water discharges." Response to Comment CTR-035-044c. In sum, based on footnote 1 of the SIP, the SIP FED and the CTR, the SIP procedures and CTR criteria cannot validly be applied to storm water.

IV. WATER QUALITY STANDARDS IN THE LOS ANGELES BASIN AS APPLIED TO STORM WATER HAVE BEEN JUDICIALLY INVALIDATED AND THEREFORE CANNOT BE ENFORCED THROUGH NUMERIC LIMITS IN NPDES PERMITS

As noted above, the Regional Board has not explained why it believes that EPA and the State Board were wrong to conclude that calculating scientifically valid numeric WQBELs for storm water discharges is infeasible. The Permit Fact Sheet and the

responses to Petitioner's comments merely assert *why* the Regional Board desires to impose numeric WQBELs, but do not take issue with any of EPA's or the State Board's factual or technical determinations regarding feasibility, or the appropriateness of BMPs when it is infeasible to properly determine numeric limits. Even assuming the Regional Board could lawfully regulate storm water discharges through the imposition of numeric WQBELs (which Petitioner disputes), it could only depart from federal and state policy through duly proposed and adopted amendments to the Water Quality Control Plan for the Los Angeles Region ("Basin Plan"). Rather than creating a *de facto* regulation or policy through ad hoc individual permitting decisions such as this one, the Basin Plan amendment process would provide the requisite notice and opportunity for dischargers and other stakeholders to participate in formulating a reasonable approach to storm water regulation (assuming *arguendo* a reasonable approach could be identified). That process would result in a full and fair evaluation on the merits of the scientific case for the Regional Board's approach, and also for consideration of technical feasibility, costs and benefits as required by state law.

In fact, the Regional Board is already under judicial order to do exactly that, in response to a challenge to its ad hoc imposition of numeric storm water limits in a permit-by-permit fashion. In the *Cities of Arcadia, et al. v. State Water Resources Control Board* case, the Orange County Superior Court voided and set aside Regional Board Resolution No. 2005-003, which concluded the 2004 Triennial Review of the Basin Plan. Judgment, p. 2-3, Super. Ct. Orange County No. 06CC02974 (Nov. 10, 2008) (attached as Exhibit 3 to this Petition). Specifically, the Court held that the water quality standards contained in the Basin Plan are void as applied to storm water discharges, because the Regional Board failed to establish such standards in accordance with the statutory requirements set forth in

Water Code section 13241(a)-(f) (requiring, among other things, that water quality standards be developed to achieve water quality "that reasonably could be achieved" and only after considering "economic" impacts on the dischargers) and section 13000 (requiring the attainment of the "highest water quality which is reasonable, considering. . . the total values involved, beneficial and detrimental, economic and social, tangible and intangible"). *Id.* at 3. The Court ordered the Regional Board to revise such water quality standards either by re-opening the 2004 Triennial Review or in the next triennial review. *Id.*

In its initial order dated July 2, 2008 (attached as Exhibit 4 to this Petition), the Court not only ordered reconsideration in the triennial review process, but also ordered the Regional and State Boards to "cease, desist, and suspend all activities relating to the implementation, application and/or enforcement of the [Water Quality] Standards in the Basin Plan, as applied or to be applied to Stormwater, whether through TMDLs or other Basin Plan amendments or regulations, or through NPDES permits" until the standards were appropriately reviewed and revised in accordance with the statutory requirements. The Court was subsequently persuaded to modify its grant of relief so as not to enjoin such implementation, in order to avoid "unintended consequences which cannot be predicted and which may result from immediate halting of all implementation, application and/or enforcement of the Standards in the Basin Plan as applied or to be applied to Stormwater. . . ." Minute Order, *Cities of Arcadia et al. v. State Board*, August 28, 2008, at 2 (attached as Exhibit 5 to this Petition). Nevertheless, that act of judicial restraint does not grant the Regional Board *carte blanche* to ignore the Court's final decision on the merits. Even with regard to existing permits, the Regional Board cannot simply behave as though the standards were fully valid and had never been voided by the Court.

In this case, Petitioner raised the same issues regarding the Regional Board's approach to storm water that were raised by the *Cities of Arcadia* plaintiffs. The Regional Board's actions in this case are even more in conflict with the Court's decision, in that wholly new numeric WQBELs for storm water were added upon renewal of a permit that did not previously contain such limits, thus taking a new action in reliance on the standards *after* they were judicially invalidated.[8]

It is well-settled that "administrative action that is not authorized by or consistent with, the acts of the Legislature is void." *Ass'n for Retarded Citizens of California v. Dep't of Developmental Services* (1985) 38 Cal. 3d 384, 391. Actions taken by administrative agencies must be within the scope of authority conferred by the relevant enabling legislation, and in accordance with standards prescribed by other provisions of law. *Id.*; see Gov't Code, § 11342.1. Because the *Cities of Arcadia* Court held that such water quality standards are void as applied to storm water – a holding that remains in the final judgment – the Regional Board is barred from imposing permit conditions requiring Petitioner to satisfy numeric effluent limits for storm water discharges, unless and until such standards are reconsidered in accordance with Water Code sections 13241(a) and 13000. In these circumstances, the State Board should not uphold the Regional Board's imposition of new numeric storm water limits, based upon the very standards that were found legally invalid by the Court.

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[8] The Basin Plan water quality standards as applied to storm water were invalidated by the initial *Cities of Arcadia* decision on July 12, 2008. Nevertheless, the Regional Board adopted the Permit in reliance on the already-invalidated standards on November 20, 2008. The Regional Board, as a respondent, obviously was aware of the Court's decision, Moreover, Petitioner expressly raised the *Cities of Arcadia* case as grounds for objection to the numeric WQBELs for storm water in the Permit, in supplemental comments submitted on November 11, 2008.

V. THE REGIONAL BOARD FAILED TO CONSIDER THE COST OF COMPLIANCE WITH NUMERIC LIMITS MORE STRINGENT THAN THE BMPS REQUIRED BY FEDERAL LAW

In *City of Burbank v. State Water Resources Control Board* (2005), 35 Cal. 4th 613, the State Supreme Court interpreted the preemptive effect of the federal CWA on certain requirements of the California Water Code. Under section 13241 of the Water Code, regional boards must consider economic factors (among a list of enumerated factors) when establishing water quality objectives in basin plans. Water Code section 13263 in turn requires permit writers to take into consideration the requirements of section 13241. The CWA, on the other hand, precludes consideration of economic factors in establishing WQBELs in NPDES permits. To reconcile these federal and state provisions, the Court concluded that federal preemption is limited to actions that are required by federal law. Where states (or regional boards) are acting to impose WQBELs or other requirements that are *more stringent* than those required by federal law, state law mandates consideration of economic factors. *City of Burbank*, 35 Cal. 4th at 627-628.

As discussed above, the CWA does not require the imposition of numeric limits for storm water discharges. Thus, the numeric limits imposed by the Regional Board in this case are more stringent than the limitations required by federal law, i.e., BMPs. Following *City of Burbank*, the Regional Board should have complied with the Water Code requirements to consider economic effects, including "the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permit . . . ." *Id.* at 620. The Regional Board did not do so, thus acting in a manner contrary to state law and the State Supreme Court's ruling in *City of Burbank.*

Had the Regional Board engaged in the proper analysis, it would have had to consider evidence that compliance with the numeric storm water limits in the Permit is infeasible and not cost-effective (see, e.g., Petitioner's November 1, 2008 comments, p. 3). In order to comply with SPCC requirements to maintain spill storage capacity, storm water cannot be allowed to accumulate for prolonged periods in the bermed area at the OTF, and

must be released to the skim pond and drainage channel. Due to space limitations at the OTF (which covers only 15-acres, most of which is or soon will be occupied by large storage tanks), storm water detention capacity cannot feasibly be expanded to accommodate any potential storm event. Moreover, it would not be cost-effective to construct extra capacity which would stand empty most of the time and be needed only on rare occasions of extreme rain events. Finally, even if all storm water could be captured for treatment, there are no demonstrated, available and cost-effective treatment technologies that are capable of achieving the numeric WQBELs for metals for highly variable and intermittent storm water flows. Reverse osmosis or precipitating technologies are designed for continuous flows and in any case would be enormously expensive, an investment that is hardly justified to address occasional exceedances causing no meaningful harm to receiving waters.

In sum, the Regional Board did not demonstrate that it will be cost-effective to comply with numeric limits, which would entail – at a minimum – construction of expensive storage facilities and wastewater treatment systems. Since the Permit imposes numeric WQBELs for storm water which go beyond the BMPs required by federal law, the Regional Board violated the Water Code by failing to consider compliance costs before adopting such more stringent requirements.[9]

As noted in Petitioner's November 11, 2008 comments, while the Regional Board made no attempt to consider the cost-effectiveness of numeric WQBELs, Regional Board staff has elsewhere suggested that dischargers should merely accept occasional violations and pay the mandatory minimum penalties ("MMPs") required under the Water Code.

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[9] It is not clear whether the Regional Board purported to rely on "best professional judgment" ("BPJ") to support any of the WQBELs or receiving water limits in the Permit, for storm water or fire prevention system test water (discussed below). In applying BPJ, however, the Regional Board should have considered the factors specified in 40 C.F.R. section 125.3(c) and (d), including the appropriate technology for the category of point sources and unique factors relating to the applicant. As with the Water Code section 13241 considerations, the record contains no such evaluation. Moreover, BPJ applies to technology-based effluent limits, not to WQBELs or receiving water limits.

Strikingly, staff assert that paying MMPs would be far more cost-effective than building sufficient detention/treatment capacity for the largest storms. Petitioner's corporate environmental compliance policy prohibits knowing violation of applicable legal requirements, irrespective of the magnitude of the penalties involved or seeming administrative acceptance of occasional violations. The Water Code section 13241 considerations are designed to prevent this counterintuitive result, and the Regional Board should not be permitted to disregard those considerations.

VI. OTHER RP FINDINGS AND PERMIT LIMITS WERE ERRONEOUS AND NOT APPROPRIATE FOR OTF'S INTERMITTENT AND BRIEF DISCHARGES

A. FIRE PREVENTION SYSTEM TEST WATER

The RP analysis and imposition of numeric limits for fire prevention system test water discharges suffer from the same deficiencies as those for storm water, as discussed above. Fire prevention system discharges occur only irregularly and briefly to test the operation of such system. The source of the test water is the municipal water supply. As described in the Permit, no chemicals are added to the fire prevention system and such water is discharged only once every three months. Permit Fact Sheet, p. F-4. Test water sprayed from the fire prevention system runs down the tank exteriors, collects in the bermed area and is conveyed to the skim pond for treatment and discharge, in exactly the same manner as intermittent rainfall. Typically, several hundred gallons are used in each 10 – 15 minute test run.

As described above in the context of storm water, the SIP and TSD procedures were designed for continuous wastewater flows. Accordingly, these procedures cannot validly be used either for evaluating RP or for calculating effluent limits for any form of short-duration, intermittent discharge, such as the fire prevention system test water discharges. Instead, as suggested in Petitioner's April 18, 2008 comment letter (p. 14), RP analysis for brief and intermittent discharges should be determined by evaluating compliance with the water quality criteria that are designed to protect aquatic life from acute toxicity (i.e., short

term effects) and should consider the mixing and dilution of the effluent in receiving waters. Having failed to demonstrate RP using technically supportable procedures, the Regional Board had no basis to impose numeric WQBELs for the fire protection system test water.[10]

B. TEMPERATURE

The Regional Board imposed technology-based limits on temperature in both storm water and fire protection system test water. However, the Permit record is devoid of any valid scientific basis for imposition of such limits. Neither storm water nor the test water is a thermal waste or an elevated temperature waste. Both are collected and discharged at the prevailing ambient temperature over which Petitioner has no control.

In response to Petitioner's comment on this issue, the Regional Board asserted that "new information" supports the necessity for this limit is necessary and that "[s]ince the discharge from these outfalls is storm water runoff and fire protection system test water, there is no reason to expect that the Discharger will have any problem meeting the stipulated effluent limit of 86°F." Response to Comments, p. 10. This inapposite rationale for an invalid permit limit is similar to staff's suggestion that Petitioner simply pay MMPs for any WQBEL exceedances that might occur. Even assuming there is some possibility that the receiving waters might exceed 86°F, the permit contains no findings which explain how ambient storm water or fire protection system test water would contribute to that situation or how Petitioner could reduce the temperature of its discharges. The fact that the Regional Board believes Petitioner will not have "any problem" meeting a limit does not justify an otherwise invalid limit.

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[10] It should also be noted that the State Board's Industrial General Permit authorizes not only storm water discharges, but also certain "non-storm water discharges" including fire hydrant flushing water and discharges from firefighting activities. State Board Order No. 97-03-DWQ, Section D.1.a, d. Fire hydrant flushing water is also managed by means of BMPs. *Id.*, Section D.1.b.iii. Accordingly, were the OTC covered by the General Permit rather than an individual permit, the fire protection system test water would be addressed as an authorized non-storm water discharge, rather than subject to numeric limits.

The Prior Permit for the OTF (issued in 2003) contained a maximum effluent limit of 100 °F and a "delta T" limit of 20 °F (meaning that the discharge could not exceed the natural receiving water temperature by more than 20°F). Prior Permit, p. 7. The temperature limits in the reissued Permit have been reduced to 86 °F and a "delta T" limit of 5 °F, purportedly on the basis of the State Board's 1975 Water Quality Control Plan for Control of Temperature in the Coastal and Interstate Waters and Enclosed Bays and Estuaries of California ("Thermal Plan"). The Thermal Plan (at p. 5) does contain an objective providing that "thermal waste discharges" shall not exceed 86°F. However, "thermal waste" is defined as "cooling water and industrial process water used for the purpose of transporting waste heat." *Id.* at p. 1. Obviously, storm water and fire protection system test water are not industrial cooling water. The Thermal Plan also provides that "elevated temperature waste discharges" (defined more broadly as any wastewater discharged at a temperature higher than that of receiving water) shall not exceed the natural receiving water temperature by more than 20°F. *Id.* at p. 5. While Petitioner maintains that its discharge is not an elevated temperature waste, even if it were, the Thermal Plan would allow for a delta T limit of 20°F (see Prior Permit, at p. 7), not 5°F as contained in the Permit (see Permit, at p. 13). Accordingly, nothing in the Thermal Plan requires or supports the new maximum limit of 86°F or the 5°F delta T limit.

The Regional Board also purports to rely on an internal staff "white paper" titled "Temperature and Dissolved Oxygen Impacts on Biota in Tidal Estuaries and Enclosed Bays in the Los Angeles Region." Fact Sheet p. F-22. (This document is the "new information" referenced in the Response to Comments, p. 10.) The white paper does not appear to have been published and is not available to the public on the Regional Board's website. In any case, its conclusions or recommendations (whatever those may be) have not been adopted as objectives by the Regional Board through the public process of amending the Basin Plan; nor does the "white paper" supersede the Thermal Plan. The Regional Board's attempt to rely on its own unpublished white paper to override a duly promulgated water quality objective constitutes improper "underground rulemaking" in

violation of the California Administrative Procedure Act and the Water Code provisions governing the basin planning process.

VII. THE REGIONAL BOARD ERRED IN IMPOSING RECEIVING WATER LIMITS AND MONITORING REQUIREMENTS FOR TOTAL COLIFORM, FECAL COLIFORM, AND ENTEROCOCCUS AND RECEIVING WATER MONITORING REQUIREMENTS FOR AMMONIA

The Regional Board improperly imposed receiving water limits and monitoring requirements for total coliform, fecal coliform and enterococcus, and receiving water monitoring requirements for ammonia, at monitoring locations RSW-001 and RSW-002. As regards the bacteria, these bacterial types are characteristic of sewage contamination. The Regional Board cites no data and provides no justification for its apparent belief that any bacteria could be present, either in the storm water or fire prevention system test water. The former is merely rainwater, while the latter comes directly from the municipal water supply which must meet drinking water standards. Nor is there any reason to expect that exposure to the tank exteriors or the ground within the bermed area could introduce bacteria into the discharges.

On the contrary, it is clear that bacterial contaminants in the receiving water originate from other sources. Petitioner's storm water and fire prevention system test water are piped from the skim pond and discharged through Discharge Point 001 to an open drainage ditch located outside Petitioner's property. This open ditch forms part of the main municipal storm sewer system in Wilmington and also receives drainage from numerous other facilities, as well as street runoff, in a highly industrialized area. Runoff from these various sources commingles in the ditch and is discharged to the Dominguez Channel at a point about 1000 feet from the OTF. Receiving water monitoring location RSW 001 is upstream and RSW 002 is downstream from the discharge point, within the Dominguez Channel estuary rather than within the storm drain ditch. Receiving water quality thus is also affected by the many other sources that discharge to the estuary, not limited to those which discharge to the ditch.

As discussed in Petitioner's April 28, 2008 comments, bacterial contamination in the Dominguez Channel originates from sources other than the OTF such as publicly owned treatment works (POTWs), leachate from area landfills, and runoff from nearby agricultural operations. Indeed, in response to Petitioner's objection that the OTF is not a source of bacterial contamination, the Regional Board admitted as much, noting only: "[t]here is a possibility that there will be other discharges to the storm drain as well as in the proximity of the sampling location RSW 002." Response to Comments, p. 28.

There is no evidence in the record to suggest that these bacterial contaminants are or could be present in Petitioner's storm water and fire prevention system test water discharges. Nor is there any evidence in the record to support a need to impose data collection requirements for these pollutants on Petitioner. None of the authorities relied on in the Permit – i.e., the CWA, the Water Code, the National Toxics Rule, CTR, SIP, or the Basin Plan (*see* Fact Sheet, pp. F-8 – F-10) – authorize the Regional Board to impose receiving water limits and monitoring requirements for contamination from other sources, wholly unrelated to past or present operations at the permitted facility. In the absence of any evidence that the OTF is or may be a source of bacteria, the Regional Board's imposition of such receiving water limits and monitoring requirements is unfounded and erroneous.

As regards ammonia, as noted above, the effluent data contain only a single recorded detection. While that potentially anomalous detection may support further monitoring of the effluent to confirm whether or not ammonia is actually present, it does not support imposing a receiving water monitoring requirement. Moreover, the negligible (if any) evidence provided by a single data point must be considered in relation to the contribution from other sources. As discussed above for bacterial contaminants, the presence of ammonia in receiving waters is due to the many other sources that discharge either to the drainage ditch or directly to the Dominguez Channel. Accordingly, the Regional Board lacked sufficient justification for imposing a receiving water monitoring

requirement for ammonia on Petitioner that cannot reasonably be expected to produce any meaningful information relating to the OTF.

REQUEST FOR RELIEF

For the reasons set forth above, Petitioner respectfully requests that the State Board grant Petitioner the following relief:

A. Amend or revise the Permit to delete the numeric effluent limits for arsenic, copper, lead, mercury, nickel, zinc, and ammonia in storm water and fire protection system test water discharges, and direct the Regional Board to require implementation of Best Management Practices for control of such discharges.

B. Amend or revise the Permit to delete the effluent limits for temperature in storm water and fire protection system test water discharges.

C. Amend or revise the Permit to delete the receiving water limits and monitoring requirements for total coliform, fecal coliform and enterococcus, and receiving water monitoring requirements for ammonia.

D. Such other relief as the State Board may deem just and proper.

Dated: December 22, 2008.

PILLSBURY WINTHROP SHAW PITTMAN LLP
MARGARET ROSEGAY
NORMAN CARLIN
MICHAEL BALSTER
50 Fremont Street
Post Office Box 7880
San Francisco, CA 94120-7880

By 

Attorneys for Petitioner

VERIFICATION

I, Chris Huy, am Senior Environmental Engineer for Ultramar, Inc. and have responsibility for oversight of water quality regulatory matters at the Wilmington Olympic Tank Farm facility located in Wilmington, California. I have read the foregoing Verified Petition for Review and Request for Hearing and believe that the statements made therein are true and correct. If called as a witness to testify with respect to the matters stated therein, I could and would competently do so under oath.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed in Wilmington, California, on December 22, 2008.

Christopher Huy

EXHIBIT 1

California Regional Water Quality Control Board
Los Angeles Region

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: http://www.waterboards.ca.gov/losangeles

Linda S. Adams
Cal/EPA Secretary

Arnold Schwarzenegger
Governor

December 1, 2008

VIA CERTIFIED MAIL
RETURNED RECEIPT REQUESTED
No. 7000 0600 0028 7445 8669

Mr. Wesley Waida
Environmental Manager
Ultramar, Inc.,Olympic Tank Farm
2402 East Anaheim Street
Wilmington, CA 90744

Dear Mr. Waida:

WASTE DISCHARGE REQUIREMENTS – ULTRAMAR, INCORPORATED, OLYMPIC TANK FARM, WILMINGTON, CA. (NPDES NO. CA0057568, CI NO. 6211)

Our letter dated September 10, 2008, transmitted a revised tentative order for renewal of your permit to discharge wastes under the National Pollutant Discharge Elimination System (NPDES) Program.

Pursuant to Division 7 of the California Water Code, this Regional Board at a public hearing held on November 20, 2008, reviewed the tentative Waste Discharge Requirements (WDRs), considered all factors in the case, and adopted Order No. R4-2008-0123 (copy attached) relative to this waste discharge. Order No. R4-2008-0123 serves as your permit under the NPDES program and expires on October 10, 2013. Section 13376 of the California Water Code requires that an application for a new permit must be filed at least 180 days before the expiration date.

You are required to implement the *Monitoring and Reporting Program* (MRP) on the effective date of Order No. R4-2008-0123. Your first monitoring report for the December 20 to December 31, 2008, reporting period is due by February 1, 2009. All monitoring reports should be sent to the Regional Board, Attn: Information Technology Unit.

When submitting monitoring, technical reports, or any correspondence regarding the discharge under Order No. R4-2008-0123 to the Regional Board, please include a reference to *Compliance File No. CI 6211 and NPDES No. CA0057568,* which will assure that the reports are directed to the appropriate file and staff. Please do not combine your discharge monitoring reports with other reports. Please submit each type of report as a separate document.

We are sending the final copy of the permit only to the Discharger. For those on the mailing list who would like access to a copy of the final permit, please go to the Regional Board's website http://www.waterboards.ca.gov/losangeles/.

If you have any questions, please contact Mazhar Ali at (213) 576-6652.

Sincerely,

Cassandra D. Owens, Chief
Industrial Permitting Unit

Attachments

cc Environmental Protection Agency, Region 9, Permits Branch (WTR-5)
U.S. Army Corps of Engineers
NOAA, National Marine Fisheries Service
Department of Interior, U.S. Fish and Wildlife Service
Mr. Philip Isorena , State Water Resources Control Board, Division of Water Quality
Mr. William Paznokas, Department of Fish and Game, Region 5
Department of Health Services, Sanitary Engineering Section
California State Parks and Recreation
California Coastal Commission, South Coast Region
Water Replenishment District of Southern California
Los Angeles County, Department of Public Works, Waste Management Division
Los Angeles County, Department of Health Services
Dr. Mark Gold, Heal the Bay
Mr. Tom Ford, Santa Monica Baykeeper
Mr. David Beckman, Natural Resources Defense Council
Ms. Ann Heil, County Sanitation Districts of Los Angeles County
Mr. Jae Kim, Tetra Tech
Ms. Stephanie Trotter, State Water Resources Control Board

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

LOS ANGELES REGION

320 W. 4th Street, Suite 200, Los Angeles, California 90013
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ORDER NO. R4-2008-0123
NPDES NO. CA0057568

WASTE DISCHARGE REQUIREMENTS FOR ULTRAMAR, INC., OLYMPIC TANK FARM SKIM POND

The following Discharger is subject to waste discharge requirements as set forth in this Order:

Table 1. Discharger Information

Discharger	Ultramar, Inc.
Name of Facility	Olympic Tank Farm – Skim Pond
Facility Address	1220 North Alameda Street
	Wilmington, CA 90749
	Los Angeles County
The U.S. Environmental Protection Agency (USEPA) and the Regional Water Quality Control Board have classified this discharge as a minor discharge.	

The discharge by Ultramar, Inc. from the discharge points identified below is subject to waste discharge requirements as set forth in this Order:

Table 2. Discharge Location

Discharge Point	Effluent Description	Discharge Point Latitude	Discharge Point Longitude	Receiving Water
001	Stormwater Runoff and Fire Protection System Test Water	33°, 47', 12" N	118°, 14', 16" W	Dominguez Channel Estuary

Table 3. Administrative Information

This Order was adopted by the Regional Water Quality Control Board on:	November 20, 2008
This Order shall become effective on:	December 20, 2008
This Order shall expire on:	October 10, 2013
The Discharger shall file a Report of Waste Discharge in accordance with title 23, California Code of Regulations, as application for issuance of new waste discharge requirements no later than:	180 days prior to the Order expiration date (October 10, 2013)

March 18, 2008
Revised: June 9, 2008
Revised: September 9, 2008
Revised: November 6, 2008

IT IS HEREBY ORDERED, that Order No. R4-2003-0052 is rescinded upon the effective date of this Order except for enforcement purposes, and, in order to meet the provisions contained in division 7 of the Water Code (commencing with section 13000) and regulations adopted thereunder, and the provisions of the federal Clean Water Act (CWA), and regulations and guidelines adopted thereunder, the Discharger shall comply with the requirements in this Order.

I, Tracy J. Egoscue, Executive Officer, do hereby certify that this Order with all attachments is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on November 20, 2008.

Tracy J. Egoscue, Executive Officer

March 18, 2008
Revised: June 9, 2008
Revised: September 9, 2008
Revised: November 6, 2008

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